Office-Supreme Court, U.S.
FILED
OCT 5 1984
ALEXANDER L. STEVAS,
CLERK

NO. 84-196

in the Supreme Court of the United States

OCTOBER TERM, 1984

ROSEMARY FURMAN, d/b/a
NORTHSIDE SECRETARIAL SERVICE,
Appellant,

vs.

THE FLORIDA BAR,
Appellee.

On Appeal from the Supreme Court of Florida

MOTION TO DISMISS OR AFFIRM

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INTRODUCTION

The Florida Supreme Court unanimously concluded that Rosemary Furman had engaged in unauthorized practice of law in Florida, thereby violating an earlier order prohibiting her from engaging in such conduct. Finding Ms. Furman to be in contempt, the Florida Supreme Court sentenced her to 120 days imprisonment, but suspended 90 days of that term. *The Florida Bar v. Furman*, 451 So.2d 808,816 (Fla. 1984); J.S.App.1a,14a.

Ms. Furman does not quarrel here with the facts of her misconduct. She seeks plenary review in this Court based upon her claims that she was entitled to a jury trial either because (1) she faced a maximum penalty of five months incarceration and a $2500 fine, or (2) because "local judges . . . and the Justices of the Florida Supreme Court" were too biased to try her. Jurisdictional Statement at 12,16.

As we demonstrate below, Ms. Furman's first contention is without merit because the right to a jury trial is measured by the actual sentence imposed, which in this case falls far short of requiring a jury trial.

Her second contention is devoid of any precedential support and is built upon *ad hominem* assumptions of malice which are unsupported by the record.

What the record does reflect is a fair, patient and sensitive attempt by the Florida Supreme Court to contend with a person who, for personal economic gain, practiced law without a license.

STATEMENT OF THE CASE AND FACTS

There is no real dispute regarding the case or the facts. In 1979 the Florida Supreme Court found that Rosemary Furman, doing business as Northside Secretarial Service, engaged in the unauthorized practice of law. The Court "permanently enjoined and restrained [her] from further engaging in the unauthorized practice of law in the State of Florida." *The Florida Bar v. Furman*, 376 So.2d 378,382 (Fla. 1979), *appeal dismissed*, 444 U.S. 1061 (1980).

No fine or sentence of incarceration was imposed. Indeed, the Court used Ms. Furman's case to call for a study of improving the delivery of legal services in Florida. *Id.*, 376 So.2d at 382. Thus, while being firm, but not punitive with Ms. Furman, it also acknowledged her role as a catalyst for change.

Ms. Furman did not change. In September, 1982 and March, 1983 the Florida Bar alleged a total of sixteen instances of her continued unauthorized practice of law, and in November, 1982 and March, 1983 the Florida Supreme Court issued rules to show cause based upon those allegations. J.S.App.2a.

A Florida Circuit Judge was appointed as a referee to make factual findings and recommendations to the Florida Supreme Court. His extensive Recommended Findings of Fact, Judgment and Sentence found twelve instances of unauthorized practice, concluding that Ms. Furman's violations were "glaring and deliberate" and in "blatant disregard" of the Florida Supreme Court's 1979 injunction. J.S.App.48a. The reference recommended a sentence of four months in the state prison. *Id.*[1]

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[1]Since the facts of Ms. Furman's violations are not contested here, we do not dwell upon them. They are detailed in the Appendix to the Jurisdictional Statement at pp.33a-42a. The Florida Supreme Court summed them up this way:

> The uncontradicted testimony of former customers of respondent was that she advised them to falsify information in marriage dissolution papers and to conceal relevant information from the courts acting on the dissolution petitions. Her purported reasons were various: its none of their damn business, they don't pay any attention to the information, or you'll (either) get less or give more money in the dissolution judgment.

The Florida Bar v. Furman, 451 So.2d at 810; J.S.App.2a.

The Florida Supreme Court reviewed the findings on the twelve charges and found them to be supported by the evidence, J.S.App.11a. However the Court rejected the referee's recommended punishment and instead sentenced Ms. Furman to 30 days imprisonment in the Duval County jail, plus a 90 day suspended sentence conditioned upon no violations of the injunction for a two year period. J.S.App.14a.

The Florida Supreme Court also rejected Ms. Furman's argument that she was entitled to a jury trial. Utilizing *Taylor v. Hayes*, 418 U.S. 488,495 (1974), the Court concluded that the penalty actually imposed did not exceed six months incarceration and thus did not require a jury trial under applicable decisions of this Court. And the Florida Supreme Court rejected her jury trial argument based on judicial bias. Characterizing it as a claim that she could not be judged by members of the Bar "because she has anointed herself as the nemesis of the state's legal system", the Court found the proposition to be meritless. J.S.App.6a.

A concurring Justice reiterated the Court's commitment to adequate delivery of legal services, and then summed up Ms. Furman's continuing commitment to her course of conduct:

> Ms. Furman's "clerical service" is a profit making enterprise. She has not just prepared forms for a fee. The uncontroverted evidence reflects that she has advised her customers to take actions that were contrary to their best interests and, even more egregious, has advised her customers to provide the court with false or

misleading information. This conduct not only constitutes the unlawful practice of law, but it also corrupts the judicial process. If Ms. Furman were a lawyer this conduct would be a serious disciplinary offense that could lead to disbarment.

451 So.2d at 816; J.S. App.15a (Overton,J., specially concurring).

We turn to the reasons why Ms. Furman's demand for a jury trial has no merit, and why her appeal should be dismissed, or the decision below affirmed.

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

A. The Right To A Jury Trial Is Governed By The Sentence Imposed. Since The Actual Sentence In This Case Was Less Than Six Months Imprisonment, There Is No Substantial Question Posed By The Apellant's Demand For A Jury Trial

As stated by Ms. Furman, the question presented is whether a proceeding for indirect criminal contempt which carries a maximum penalty of five months and a $2500 fine requires a trial by jury.

The actual punishment imposed upon Ms. Furman was 120 days imprisonment, with 90 days suspended. Thus under *Taylor v. Hayes*, 418 U.S. 488,496 (1974), the question really presented is whether a trial by jury is required in an indirect criminal contempt proceeding where the sentence imposed was 120 days of imprisonment, with 90 days suspended.

The answer to the proper formulation of the question is that no jury trial is required. In *Taylor v. Hayes* the Court wrote:

> [I]n the absence of legislative authorization of serious penalties for contempt a state may choose to try any contempt without a jury if it determines not to impose a sentence longer than six months . . . We remain firmly committed to the proposition that "criminal contempt is not a crime of the sort that requires the right to jury trial regardless of the penalty

involved." *Bloom v. Illinois*, [391 U.S. 194] at 211; cf. *Argersinger v. Hamlin*, 407 U.S. 25,30 (1972).

Id., 418 U.S. at 496.

In this case the maximum permissible penalty did not exceed six months imprisonment. Therefore *Bloom v. Illinois*, 391 U.S. 194 (1968), forecloses the jury trial claim on that front.

Since the actual sentence imposed did not exceed six months, *Taylor v. Hayes*, *supra*, *Bloom v. Illinois*, 391 U.S. at 211, *Codispoti v. Pennsylvania*, 418 U.S. 506,511 (1974), and *Cheff v. Schnackenberg*, 384 U.S. 373,380 (1966), totally foreclose the jury trial claim on any front.

The potential for a $2500 fine is thus irrelevant under the unbroken line of cases which focus attention on the sentence actually imposed.

Neither *Muniz v. Hoffman*, 422 U.S. 454 (1975), nor any of the Court of Appeals decisions responding to jury trial claims when fines were imposed for criminal contempt, undermine the *Taylor v. Hayes* "actual sentence" standard. Indeed, they confirm that the sentence

actually imposed is the benchmark for determining the right to a jury trial.[2]

Therefore, since no fine was actually imposed upon Ms. Furman, her attempt to use her exposure to a

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[2]In *Muniz*, the actual sentence imposed upon a large labor union was $10,000. No jury trial was required. The Court's capsulation of the constitutional doctrines included the actual sentence view that "lacking legislative authorization of more serious punishment, a sentence of as much as six months in prison, plus normal periods of probation, may be imposed without a jury trial. . ." 422 U.S. at 476.

In *Douglass v. First National Realty Corp.*, 543 F.2d 894,903 (D.C.Cir.1976), the Court obviated the need for a jury trial in a $5,000 fine case by "adjust[ing] the fine downward to $500." In *Richmond Black Police Officers v. City of Richmond*, 548 F.2d 123, 128 (4th Cir.1977), the Court wrote "since the penalty which actually was imposed [$250] squares with the definition of 'petty' contempt", the failure to accord a jury trial was harmless.

In *Girard v. Goins*, 575 F.2d 160,165 (8th Cir.1978), the Court concluded that fines against individuals ranging from $2500 to $10,000 required a jury trial, but that "if the state court reduces the fines to a non-serious level, then a jury trial would not be required." In *United States v. PATCO*, 678 F.2d 1,5 (1st Cir.1982), the Court acknowledged it "could perhaps cure [the jury trial problem] by reduction of the fine to a non-serious level", although other errors required reversal, negating that need. Finally, in *United States v. Gedraitis*, 690 F.2d 351,354 (3rd Cir.1982), the Court hewed to this Court's view: "The Supreme Court has held that the severity of the penalty actually imposed is the best indication of the seriousness of the offense."

The other cases cited in the Jurisdictional Statement at footnotes 2 and 4 do not involve contempt. The lesson of the contempt cases is unequivocal—the right to a jury trial is always tested by the actual sentence imposed.

$2500 fine as the basis for her jury trial claim is completely devoid of merit.

Simply put, every relevant decision of this Court requires that a contemnor's claim to a jury trial be considered in light of the sentence actually imposed upon the transgressor. The sentence actually imposed here was 120 days imprisonment, with 90 days suspended. There is no precedential support for Ms. Furman's position. Her appeal should be dismissed for want of a substantial federal question or, in the alternative, the Florida Supreme Court's decision, based upon the *Taylor v. Hayes* doctrine, should be affirmed.

B. The "Biased Judiciary" Due Process Demand For A Jury Trial Is Devoid Of Precedential Support, Devoid Of Record Support, And Presents No Basis For Requiring This Court's Exercise Of Jurisdiction.

The thrust of Ms. Furman's due process claim is that she could not get a fair trial "because of the longstanding adversary relation between herself on the one hand and the Florida Bar, the local judges in Duval County, and the Justices of the Florida Supreme Court on the other." J.S. at 16.

No facts support her blanket indictment of the Florida legal system. No case even intimates that an integrated Bar's attempt to enforce rules against the unauthorized practice of law renders the state's legal system impotent *vis à vis* a continuing protagonist. If such a theory were accepted, brazen violaters would fare better than timid ones, encouraging bold transgressions.

The various cases cited in support of the undisputed general proposition that likelihood or appearance of bias triggers due process protections prove nothing here. The due process question is whether there has been a "procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused." *Tumey v. Ohio*, 273 U.S. 510,532 (1927); *Marshall v. Jerrico, Inc.*, 446 U.S. 238,242 (1980); *Taylor v. Hayes, supra* at 501.

Certainly, the notion that the integrity of all seven Justices of the Florida Supreme Court would be affected by the economic impact of Ms. Furman's violation of "rules defining the extent of the Bar's monopoly", J.S. at 16, is absurd. In fact, she fails to cite a single factual instance of Florida Supreme Court bias or antipathy during this proceeding, preferring to focus her attention upon "the trial judges of Duval County [and] members of the Bar . . . who filed every one of the charges against her. . ." J.S. at 17. Thus, she finds bias emanating from the fact that another circuit judge "sat in at [a] status conference"; that the referee found Ms. Furman acted wilfully and maliciously for pecuniary gain, although the Bar did not press for those conclusions; and that the referee had prepared his factual views before the sentencing, leaving blank the sentence recommendation. This is her evidence "that she could not have a fair trial except before a jury of her peers." J.S. at 18.

Aside from the fact that the Florida Supreme Court was the final arbiter of Ms. Furman's fate—not the referee, or the members of the Bar, or a circuit judge

who sat in at a status conference – all of her grievances fall far short of passing the evidentiary test for bias which implicates due process concerns.[3]

In *Taylor v. Hayes*, the trial judge had continually displayed an "unfavorable personal attitude toward petitioner, his ability, and his motives", thus requiring a different judge to consider the contempt. 418 U.S. at 501-502. In *Mayberry v. Pennsylvania*, 400 U.S. 455,465 (1971), the trial judge had been "vilified" and "cruelly slandered." In *Tumey v. Ohio, supra*, the judicial officer's salary was partially paid by fees and costs imposed by him.

In this case Ms. Furman complains that the Florida Supreme Court "hand picked" the referee, and that in the 1979 original proceeding the Court requested the Bar to recommend a sentence, although the order to show cause sought only injunctive relief. J.S. at 17. So advised, the 1979 Court deleted the reference to contempt, imposed no sentence, and used the case as a springboard for improving the delivery of legal services. *Furman v. Florida Bar, supra*, 376 So.2d at 382.

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[3]We do not imply that any of Ms. Furman's allegations against the referee and the Bar connote prejudice. That the Bar did not seek a pecuniary gain or a wilfullness ruling reflects its patience. While Ms. Furman downplays her profit, she does not dispute her $50 per client economic interest, J.S. at 17, nor does she ever dispute her continuing interest in providing legal advice in Florida without a license. J.S. *passim*. The referee therefore had a basis for his findings. The referee's patience at sentencing is reflected by his having distributed the draft of his recommendations to Ms. Furman's counsel and providing a recess for her to respond, an invitation which she declined. J.S.App.3a. Given his undisputed findings, leaving blank the sentence denotes openmindedness, not prejudgment.

On these facts, Ms. Furman seeks to liken this case to *Hayes*, *Mayberry* and *Tumey*. She paints on the wrong canvas. This picture is clear. Neither the facts nor the law demand plenary review by this Court.

CONCLUSION

For the foregoing reasons the appeal should be dismissed or the decision of the Florida Supreme Court summarily affirmed, and, as to Appellant's Point II, certiorari denied.

Respectfully submitted,

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